



# Legal Impediments in Implementing the Vision 2030 Medium Term Plan 3 Program in Kenya

Jackson Bett

School of law University of Nairobi.

### ARTICLE INFO

#### Article history:

Received: 18 May 2018;

Received in revised form:

28 July 2018;

Accepted: 8 August 2018;

#### Keywords

Vision 2030,

Sustainable,

Development Goals,

Agenda 2063.

### ABSTRACT

The Third Medium Term Plan is an implementation programme for the Vision 2030 running from 2018 to 2022. It outlines the sectors which the winning party in the August 2018 General Election will focus on for the next 5 years in addition to its manifesto. The projects that were not completed in the Second Medium Term Plan will be carried forward in the Third Medium Term Plan. The primary focus on the Third Medium Term Plan will be to expand the sectors of export, manufacturing and mining. It purposes to achieve a 10% economic growth by the end of the Third Medium Term Plan. The implementation of the Third Medium Term Plan comes at a time when Kenya has committed to implement the 17 Sustainable Development Goals and African Union Agenda 2063. The implementation of the MTP 3 faces multiple challenges such as a climate change sensitive economy that is necessitating the government of Kenya to adopt supplementary budget to counter food shortage and deal with national emergencies. The implementation of the Medium-Term Plan is also facing a rising foreign debt to GDP ratio as the government is forced to borrow externally to finance the MTP 3. The implementation of the MTP 3 faces multiple legal challenges such as lack of coherence in laws dealing with manufacturing, disputes in the acquisition and transfer of land, legal lacuna in the prosecution of corruption cases that pave way for rampant corruption in Kenya. The lack of a comprehensive legislation on Agriculture and a policy on reducing post-harvest loses is one of the main challenges facing the Third Medium Term Plan. The paper will explore the legal challenges facing the implementation of the MTP 3 and offer recommendations on how to streamline the implementation of the MTP 3.

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### Introduction

The Third Vision 2030 Medium Term Plan (2018-2022) is part of a long-term strategy that aims to transform Kenya into an industrialized country with an upper middle-class citizenry. It succeeds the Second Medium Term Plan (2013-2017) and like its predecessors it is guided by the Constitution and Vision 2030. The Third MTP will endeavor to achieve economic goal of 10% by the end of the term project. It will also focus on programmes, policies and strategies to achieve inclusive economic growth, sustainable development, faster job creation and reduce poverty and inequality in the country. While seeking to achieve the aforementioned goals the MTP 3 will also aim to meet the 17 Sustainable Development Goals, African Union Agenda 2063 and take into account the impact of climate change. The MTP 3 will be geared towards completing the development projects that were started under the MTP 2 and increasing the number of investments in the country and subsequently improving the success rate of those investments.

The MTP 3 will focus on structural changes in the economy such as increasing the shares of manufacturing, export and industrial sector. This will require the development of the oil and minerals sector of the country which will be instrumental in improving their contribution in the economy. The MTP 3 will also focus on developing the upstream, downstream and mid-stream infrastructure to facilitate the exploitation of minerals and natural resources.

The Medium-Term Plan 3 has identified the enablers to achieving these goals. These enablers are infrastructure, public sector reforms, science, Technology and Innovation (SCTI) and Innovation. The government has to increase budgetary allocations on these sectors between 2018 and 2022. An increase in budgetary allocation will ensure that the development projects that were started during the Second MTP-3s are completed and those that are scheduled for the third plan are initiated. The Government of Kenya plans to attract investments both private and public. It also seeks to increase the reliance on public and private partnerships in the country. The Public and Private Partnerships (PPP) will pave way for implementing programmes and projects. The Third MTP will also be prepared against slow economic drop catalysts such as the Brexit Vote and unstable financial markets.

### Background

The implementation of the Second MTP plan required an elaborate system of laws to guide the national and county governments. New laws governing novel areas of the Kenyan economy were also passed in the National Assembly and the Senate. In a bid to facilitate the development of the Blue economy, the government launched the Tuna Fisheries and Development Strategy in 2014.<sup>1</sup>

<sup>1</sup> Concept Note on the Third Medium Term Plan 2018-2022. Ministry of Devolution and Planning. Republic of Kenya.

The Fisheries Management and Development Bill was passed into law in 2016. The passing of the Special Economic Zones Act in 2015 paved way for the development of a SEZ at Dongo Kundu on a 3000-acre piece of Land, 4,733.7 acres of land belonging to Tatu City in Ruiru, Kiambu County, 100 acres in Kitengela and a private SEZ on a 700-acre land in Uasin Gishu County.<sup>2</sup>

The SEZ will boost the country's manufacturing sector and increase the number of exports into the country. In order to lower the cost of accessing credit in the country, the Banking (Amendment) Act was passed in 2016 which capped the interest rates at 4% above the rate of the CBK. The Kenya mining sector has suffered under inefficient laws governing the sector. The Mining Act of 2016 streamlined the sector and incorporated the international best practices for mining and exploration of petroleum in the country. The Mining Act 2016 replaced the mining legislation which was passed during the colonial times. In 2013 the National Capacity Building Framework was developed and launched across all the 47 counties. For a smooth functioning of county governments and the national government, the National Government Co-ordination Act (2013) and the Transition County Allocation Act was also passed.

### **Overview of the Legal Impediments in Implementing MTP 3**

The Third Vision 2030 Medium Term Plan (2018-2022) faces several legal impediments that will curtail the implementation of the plan. The Third Medium Term Plan comes into a conflict with an underdeveloped manufacturing sector that is in urgent need of legal reform. Its implementation begins at a time when the Agricultural sector is highly taxed and is governed by multiple state agencies. The duplication of functions by the state agencies increases the taxation rate on the average farmer and therefore greatly reduces his or her profit margin. The Kenyan government is yet to come up with a comprehensive legal framework and policy for the implementation of the 17 Sustainable Development Goals across the 17 counties. There is also a need for a legal and policy framework that harmonizes the expectations of the 2030 Agenda: 17 Sustainable Development Goals and African Union Agenda 2063. This paper will explore the legal challenges that are facing the MTP 3 and offer recommendations on how to overcome those challenges.

### **The Manufacturing Sector**

In the 2015/2016 financial year the manufacturing sector accounted for 14% of the GDP in Kenya. Industrial activity is concentrated in Nairobi, Mombasa and Kisumu. The majority of the businesses that are in the manufacturing sector are owned by Kenyans and a few foreigners. Kenya wants to increase the level of foreign investment in Kenya in order for the manufacturing sector to grow. Foreign investments seeking to venture into Kenya's manufacturing sector usually encounter many legal challenges which in the end delay their ventures. The biggest legal challenge for foreign investors is the lack of a centralized system where they can register their businesses and acquire the necessary permits and licences. The process is spread across several pieces of legislation. Acquisition of land for the purpose of setting up a

manufacturing sector is also a long and complicated procedure that is characterized by land title disputes and delays in acquiring titles. These legal hurdles make it very difficult for foreigners to venture into the Kenyan manufacturing sector. Incorporating a company in Kenya requires about 7 procedures and it takes up to 23 days to complete in Nairobi. Construction permits are harder to obtain in Kenya. A person seeking construction permit will have to comply with about 17 procedures and wait up to about

108 days for the construction permit to be issued. The costs of registration usually take 3.08% of the total cost of the warehouse. Although the process of acquiring a business permit is two months faster than the average (162 days) days in Sub-Saharan Africa, the procedures are three times higher than the global average.

In order to acquire a license to manufacture excisable goods in Kenya, the foreign investor is expected to fill Form E.1 in duplicate, provide architectural drawings of the premises, provide the certificate of incorporation and the list of directors, provide the PIN certificates for the application and directors, provide a copy of the VAT certificates, provide details of their bankers, provide a certificate of KEBS of compliance with standards, provide a public health certificate and provide a single business certificate. In addition to that the aspiring manufacturer is also expected to comply with ETR requirements, provide brand details including volume pricing, provide input-output ratios for their businesses, provide a security bond in protection of excise duty on exports, provide brand packaging sizes and production formula. The process is usually a long one and it might take years before eventually getting the manufacturing license. It is also not beginner-friendly and hence the foreign investor has to hire an advocate to help in the registration process. Eventually when you factor in the legal fees, the cost of registration, the cost of land and the cost of setting up the manufacturing premises, the cost of a foreign investor establishing a manufacturing firm in Kenya are extremely high. The protracted registration process is not only a challenge for foreign based investors but local investors as well. The majority of the local firms that have ventured in Kenya have opted not to register their businesses formally. This has led to the rise of counterfeit industry which in turn makes Kenya unsuitable for foreign investors.

With a devolved system of government, the transactional costs for a foreigner establishing a manufacturing sector in Kenya have gone up. This is because the investor has to navigate through a labyrinth of national and county government regulations in order to gain approval to establish a manufacturing sector. The Buy and Build Kenya Act and Procurement and Disposal Act have not been implemented with the view of promoting and protecting local content. Locally produced goods in Kenya have to compete with imported goods leaving local manufacturers with very low profit margins on their products.

### **Public Private Partnerships**

The success of Vision 2030 is pegged on Public Private Partnerships. The PPP have been adopted in order to curb the rising debt, cater for the funding gap and fund the infrastructure projects across the country. The public and private partnerships have been used to fund development projects in western countries since 1970s. Kenya enacted the Public Private Partnership Act in 2013 in an effort to streamline the process and attract investments into the private sector.

<sup>2</sup>See: <https://www.standardmedia.co.ke/business/article/2001249043/is-kenya-overbanking-on-new-special-economic-zones-to-drive-growth>

The success of Vision 2030 will be largely depending on the success of the public and private partnerships. The Public Private Partnership Act faces several legal barriers that will curtail the achievement of the Medium-Term Plan- 3. Kenya is still facing the challenge of establishing a favorable legal framework for the judicial enforcement of contractual rights. Although Kenya has enacted the Public Private Partnership Act, there are no clear regulations that assign responsibilities and provide for dispute resolution mechanisms. The PPP legal framework should be succinctly clear and provide efficient dispute resolution mechanisms that are non-discriminatory. There should also be legitimate regulatory regime for the recovery of the costs and profits that are proportional to the risks undertaken by the private contractor. Public Private Partnerships are prone to political interference and as such the existence of a functional legal and regulatory framework would reduce the risk of political interference.

With a high level of political interference from the government agencies and politicians, the public private partnerships are not attractive to local commercial banks. The majority of the PPPs end up receiving funding from overseas banks and therefore locking out qualified Kenyans who would have participated in the bidding process. The Public Private Partnership Act provides inadequate legal mechanisms to ensure that contractors meet the performance targets. The majority of the planned public private partnerships have failed in Kenya because of the secrecy surrounding the projects and lack of a strong regulatory mechanism. The bidding process is often flawed and sometimes it does not involve public participation which is a constitutional principle. A case in point is the Kinangop Wind farm which was supposed to be funded by the Norwegian Equity Fund and South Africa's Old Mutual Fund. The project would have cost \$144 million and it would have been established in Kinangop an area rich for agricultural produce. The project received a lot of resistance because farmers refused to give up their land because of the lack of public participation in the planning of the project. There is a need for an efficient public control program that ensures that the entities provide high quality services and meet the performance targets.

#### **Sustainable Development Goals**

The implementation of the Third Medium Term plan is facing legal hurdles in the actualization of the 17 Sustainable Development Goals and African Union Agenda 2063. Vision 2030 was formulated long before Kenya adopted the 17 SDGs and Agenda 2063. Kenya lacks a legal framework for the implementation of Sustainable development goals and agenda 2063. Kenya is required to present a report of the progress in the implementation of the two supranational agendas. In the realization of the sustainable development goals there are pending bills that have not been passed and several legislative amendments to the existing laws. The implementation of the SDGs has proved to be a legislative nightmare. Without a clear legal framework for the implementation of the SDGs the county governments are finding a challenge in coming up with their own policies on their implementation. For equitable distribution of wealth in the country there is a need to amend the Procurement Act. Private contractors working with government agencies usually overprice their services. The end result is the wastage of government funds and duplication of services.

There is a need for oversight on government tenders to ensure that payments are based on performance targets. The bidding process for government tenders especially at the

county government level is prone to political interference. Tenders are allocated to shell companies whose ownership and control is under the county government officials. These companies only exist on paper and in some instances, they are formed one or two months before the tender is allocated. The Procurement and Disposal Act should be amended to give priority to established small and medium -sized businesses which have ongoing business operations.

The failure by county governments to honor contractual undertakings. The majority of the private contractors who have provided services for the country governments in the last 5 years have not been paid despite rendering their services according to the tender requirements. Some of those contractors are small business owners who relied on loans to provide their services. As of October 2017, the county governments had a total of KES 90 billion in unpaid dues to contractors.<sup>3</sup> It is essential to realize that the growth of SMEs is crucial for the achievement of 10% economic growth which is outlined in the Third Medium Term Plan. The delays in payment make participation in county government tenders unfavorable for SMEs. As a consequence, this tender is now applied by big corporations which defeats the principle of equitable distribution of wealth. The long delays in payments for services rendered by the country governments are slowing down the growth of the SMEs which are the key component of achieving a 10% economic growth.

The delay in payment for the services already rendered causes a ripple effect in the economy whereby the SMEs that had relied on business loans are unable to service these existing loans. The irregular flow of income for the SMEs leads to bankruptcy which further leads to loss of employment for the employees. It is therefore reasonable to say that the delays in payments are causing economic stagnation.

In order to achieve 17 Sustainable Development Goals and African Union Agenda 2030, there is a need for a legislation governing the relationship between suppliers and retailers. This would provide a stable economic environment for businesses to thrive. The collapse of Uchumi Supermarket and Nakoma has demonstrated that there is a need to regulate this relationship. The suppliers are forced by retailers to get into agreement where they have to advertise their products even after supplying them to the retailers.

#### **Housing and Construction**

President Uhuru Kenyatta in his inaugural address after being sworn in for the second term promised that his government would facilitate affordable housing policies which would allow 500,000 new home owners by the end of his final term. Affordable housing is one of the focus areas of the Third Medium Term Plan.

During procurement of government contracts in the construction sector, there is a tendency of collusion between the tenderers and the construction consultants which results in choosing of unsuitable tenderer. In some cases, the tenderer and the consultants agree on a certain exaggerated tender sum for the projects. This is misappropriation of funds. There is need for an external oversight body to oversee the tendering process. Acquisition of construction permits take a long time and does not favour the different types of procurements methods in the construction industry.

<sup>3</sup>See:<https://www.businessdailyafrica.com/economy/Treasury-to-release-Sh77-4-billion-Counties/3946234-4215960-511n18/index.html>

The construction industry has to be audited by several government agencies such as the county government, NEMA, National Construction Authority among others. The lack of a central governing agency makes it difficult to enforce the existing laws and policies in the sector. The mandate of the central governing agency would be to verify whether the construction permits given by these agencies are up to standard. It would also keenly observe the construction process after tendering to ensure that the process adheres to the set regulations and policies of the government agencies.

### **Agriculture and Food Security**

One of the biggest challenges towards achieving food security in Kenya is the lack of a post-harvest policy. Most of the food produce is destroyed after harvesting before it reaches the consumer. The food wastages incurred in the post-harvest period could bridge the food demand gap in the country. This is a prevalent problem in Africa where African countries spent over \$ 39 billion a year importing food when these countries could produce the food themselves. The first step towards ending food insecurity in Kenya is coming up with regulations governing the harvesting and storage of food produce. Small scale and large-scale farmers should be required to store their farm produce away from moist, dust and other hostile elements of nature. The government should establish food storage facilities across the country for small scale farmers to store their food. There should be a national reporting system for demand and supply of agricultural products. This will allow farmers to transport their produce to the areas where there is high demand. The National Assembly needs to pass a legislation establishing a government institution responsible for dealing with the post-harvest handling of agricultural produce.

Gender-neutral laws that do not take account the experiences of women in the agricultural sector is the other challenge. The existing legal framework governing the agricultural sector in Kenya does not take into account the experiences of women who comprise the majority of the workers in the agricultural sector.<sup>4</sup> The majority of the farm work is done by women but despite this the land that is suitable for agriculture is mostly owned by men. The men who work in the agricultural sector end up earning more than women for the same amount of work.<sup>5</sup> The existing legislations should be amended to ensure that farm workers are fairly remunerated in the agricultural sector. Due to lack of regulation governing the employment of farm workers, the majority of workers, especially women in the agricultural sector end up underpaid and earning below the minimum wage. This is ironical because the agricultural sector is the greatest contributor to the GDP. It would be difficult to achieve the Medium-Term Plan without legal reforms in the agricultural sector. The agricultural sector is male dominated and yet the majority of the workers are women. The other major challenge is the perennial inability of the government to regulate the import of the main cash crops which have been the backbone of the Kenyan economy. Despite the surplus produce in Kenya, cheap importation of sugar, maize and

wheat has resulted in the flooding of the markets hence disenfranchising the local farmers.

### **The Kenyan Blue Economy**

The development of the blue economy is at the cornerstone of the MTP 3. There are over 12000 small scale fishermen in Kenya with the majority of them operating along the sea shores. Kenyan fishermen are unable to venture into the deep sea because of limited fishing equipment.<sup>6</sup> The concentration of the coastline in the shallow waters have depleted the fishing resources along the coastline. Kenya has a potential to produce between 150,000 metric tons and 300,000 metric tons per year from the Kenyan EEZ resources.<sup>7</sup> Kenya lacks a comprehensive legal framework governing the exploitation of its EEZ resources. Illegal, unreported and unregulated fishing is the greatest impediment towards the prosperity of the blue economy. Kenya loses approximately ksh 10 billion a year due to illegal, unreported and unregulated fishing.<sup>8</sup> Another legal challenge that might act as an impediment to prosperity of the blue economy is that lack of the enforcement of existing rules and regulations governing fishing in the Kenyan waters.<sup>9</sup> The enforcement function is left to the Kenya Maritime Authority which is understaffed and does not have the requisite capacity to patrol and ensure the compliance by fishermen to the regulations.

There is a need for a regulatory body to handle the licensing of fishermen and enforce the existing rules and regulations.

The Kenyan Marine life is constantly facing a threat from dumping of waste by ships and fishing boats. Section 44 of Fisheries Management and Development Act needs to be amended to prohibit dumping of waste in the Kenyan coastline and provide stringent punishment to those who are found guilty of dumping into the ocean.<sup>10</sup>

### **Criminal Liability in Corruption Cases**

One of the biggest impediments towards achieving the Third Medium Term Plan goals is the inability of the government to enforce the Anti-Corruption and Economic Crimes Act.

<sup>6</sup> The Freight Logistics, „Exploit Blue Economy to accelerate growth: Kenya’s World Maritime Day message,“ October 9, 2016. Available at <http://feaffa.com/magazine/2016/10/09/exploit-blue-economy-to-accelerate-growth-kenyas-world-maritime-day-message/> [Accessed on 2<sup>nd</sup> Feb 2018].

<sup>7</sup> Renison K. Ruwa, „Coastal and Offshore Marine Fisheries of Kenya: Status and Opportunities,“ KMFRI Technical Report/2004/FP/1, June 2006. Available at: <http://www.oceandocs.org/bitstream/handle/1834/7096/ktf0124.pdf?sequence=1> [Accessed on 2/Feb /2018].

<sup>8</sup> Fondo, E.N., Assessment of the Kenyan Marine Fisheries from Selected Fishing Areas, Final Project 2004, (United Nations University Fisheries Training Programme, 2004). Available at: <http://www.unuftp.is/static/fellows/document/estherprf04.pdf> [Accessed on 2nd Feb 2018]

<sup>9</sup> FAO, Fishery and Aquaculture Country Profiles: Kenya (2016), Country Profile Fact Sheets. In: FAO Fisheries and Aquaculture Department [online]. Rome. Updated 2016. <http://www.fao.org/fishery/facp/KEN/en>. [Accessed on 2<sup>nd</sup> Feb 2018].

<sup>10</sup> Mohanty, S.K., Priyadarshi Dash, Aastha Gupta and Pankhuri Gaur, “Prospects of Blue Economy in the Indian Ocean,” (Research and Information System for Developing Countries, New Delhi, 2015). Available at [http://ris.org.in/sites/default/files/pdf/Final\\_Blue\\_Economy\\_Report\\_2015-Website.pdf](http://ris.org.in/sites/default/files/pdf/Final_Blue_Economy_Report_2015-Website.pdf) [Accessed on 01/02/2018]

<sup>4</sup> Feldman, Rayah. “Women’s Groups and Women’s Subordination: An Analysis of Policies towards Rural Women in Kenya.” *Review of African Political Economy* 10.27 (1983): 67-85. Taylor & Francis Online. Accessed 2<sup>nd</sup> Feb 2018

<sup>5</sup> Karani, Florida A. “The Situation and Roles of Women in Kenya: An Overview.” *The Journal of Negro Education* 56.3 (1987): 422-34. JSTOR. Accessed 2<sup>nd</sup> Feb 2018.

Kenya has lagged behind in economic development due to rampant corruption which has entailed the siphoning of funds from public coffers.<sup>11</sup> Funds that are allocated for development of infrastructure or healthcare are misappropriated by greedy public officials. Corruption in Kenya has been exacerbated by the existence of legal loopholes which prevent the prosecution of persons who have been suspected of corruption. The Anti-Corruption and Economic Crimes Act which was passed in 2003 was intended to apply in accord to the United Nations convention on corruption. The corruption legal framework is too complex for legal practitioners, and law enforcement agencies. The legal framework consists of the Anti-Corruption and Economic Crimes Act 2003, Public Officer Ethics Act 2003, Public Procurement and Disposal Act 2005, Proceeds from Crime and Anti-Money Laundering Act 2009, Ethics and Anti-Corruption Act and the Leadership and Integrity Act which was passed in pursuant to the Constitution of Kenya 2010. Even with multiple laws enacted to curb corruption in Kenya, corruption remains one of the biggest problems facing our country.<sup>12</sup> Corruption is the biggest threat to MTP 3. Despite the heavy borrowing in order to fund infrastructure projects, the funds allocated for these projects are misappropriated.<sup>13</sup> The projects that are undertaken by the government are overpriced and end up costing ten times what they would have ordinarily cost if there was a fair, transparent and open procurement system and government oversight was exercised in all levels of procurement.

Anti-corruption and Economic Crimes Act is outdated and in urgent need of reform. There is a need for a new comprehensive legislation on corruption and economic crimes. Several fundamental sections in the act have been repealed by the court for not conforming to the constitution of Kenya 2010. The elements of unconstitutionality make it easy for corruption cases to be defeated in court and consequently, the lack of deterrence in engaging in corrupt acts. A case in point is Section 26 of the Anti-Corruption and Economic Crimes Act that requires a person who has been accused of corruption to provide information on how suspect's property was acquired. Failure to providing that information, the person would have deemed to have committed an offence and is liable for a fine or Ksh. 300,000 or a prison sentence of 3 years or both. Section 30 of the Act goes further to state that information acquired in this manner can be used as evidence in prosecution. These two sections are contrary to natural justice and basic principles of law. These two sections are contrary to the right to fair hearing that is enshrined in Article 50 of the Constitution of Kenya. The Person who is accused of a crime has a right to know which offence he or she is charged with. Article 50 also includes the right to refuse to give self-incriminating evidence. Section 26 is also inconsistent with Article 31 of the constitution which states that every person has a right to privacy which includes the right to have information regarding their family or private affairs unnecessarily revealed or required. Section 55 (2) of

the Act requires a person to explain the disproportion of his property that might be identified by the Ethics and Anti-Corruption Commission. The burden of proof is always on the person who alleges and Ethics and Anti-Corruption commission should be able to prove that based on the suspects income, it is disproportionate for that person to own that property. For the Ethics and Anti-Corruption Commission to Acquire a suspect's property based on the aforementioned principle, it would amount to arbitrarily violating a person's constitutional right to own property which is unconstitutional. In *KACC v Stanley Mambo Amati (2011) eKLR*, the Court of Appeal further determined that section 55(2) offended Articles 24 and 25 of the Constitution. Section 58 of the Anti-Corruption and Economic Crimes Act states that where the accused person is proved to have done that act, the person shall be presumed to have done that act corruptly unless the contrary is proved. This commonly referred to as the presumption of corruption. The presumption of corruption is a draconian section which negates the presumption of innocence until proven guilty. The presumption of innocence is a fundamental section of the right to fair trial.

The Anti-Corruption and Economic Crimes Act does not impose criminal liability to corporations which engage in acts of corruption. The concept of criminal liability is only limited to natural persons unlike other jurisdictions where corporate criminal liability is essential in combating acts of corruption. The lack of corporate criminal liability will be a huge impediment in achieving the Third Medium Term Plan. The corruption scandals that arose during the implementation of the Second Medium Term Plan involved registered corporations in Kenya. Corrupt public officials usually use corporate entities to embezzle funds from the public. These corporations acquire assets from the embezzled funds and because they are beyond the scope of criminal liability under the Anti-Corruption and Economic Crimes Act, these assets are challenging to recover by the Asset Recovery Agency.<sup>14</sup> The lack of corporate criminal liability creates compliance difficulties for corporations which are operating in Kenya given the potential of corruption in public and private sector.<sup>15</sup> International corporations are forced to engage in bribery with influential figures in the government to get procurement favors or to influence policy making.<sup>16</sup> The strange thing is that those corporations once discovered, they are prosecuted and fined if they are based in United Kingdom or the United States. The irony is that there are no prosecutions that are instituted in Kenya. There is a need for a new legal regime to impose tough judicial and administrative sanctions to corporations that engage in corruption. These judicial and administrative sanctions should apply to Kenyan and Non-Kenyan officials of those companies. Without a legal framework on corporate criminal liability for corporations engaging in corruption, bribery is considered as an essential factor in doing business considering how rampant

<sup>11</sup>Akech, M.(2011). Abuse of power and corruption in Kenya: Will the new constitution enhance government accountability. *Indiana Journal of Global Legal Studies*, 18(1), 341–394.

<sup>12</sup>Chebet, C. (2010, June 14).Corrupt ways of government officials. *The Standard*, p. 13.

<sup>13</sup>Andvig, J. C., & Barasa, T.(2011). Cops and crime in Kenya: A research report.Norwegian Institute of International Affairs (NUPI) Working Paper 794. Oslo: NUPI.

<sup>14</sup>Republic of Kenya. (2003a). *The Anti-Corruption and Economic Crimes Act, 2003*. Nairobi: Republic of Kenya.

<sup>15</sup>Ibid.

<sup>16</sup>Githongo,J. (2015, August 6). Kenya's Rampant corruption is eating away at the very fabric of democracy. *The Guardian*: <https://www.theguardian.com/global-development/2015/aug/06/Kenya-barack-obama-visit-anti-corruption-plan-democracy> (Accessed 22 Feb 2018).

corruption is in Kenya.<sup>17</sup> The Introduction of section 25A of the Miscellaneous Amendment Statute 2007 introduced what is known as the Amnesty Clause. It gives the Attorney General, the EACC Director and the relevant minister the power to terminate cases that were already instituted by the commission. There is a need for the review of the legal framework on corruption matters in Kenya that is in accord with the Constitutional principles.

The courts in Kenya have held that the Ethics and Anti-Corruption commission cannot apply for orders seeking for the freezing of a suspect's assets without filing a suit in court. This eliminates the element of surprise which is essential in the prosecution of corruption cases in Kenya. The element of surprise is considered standard practice in other jurisdictions. The lack of congruency between Kenyan laws and international law has also made it difficult for international corporations in the investigation and prosecution of corruption crimes. The United Nations Convention against Corruption provides that signatory countries should accord each other the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings under the relevant domestic laws. Kenya has not pursued this option to its full measure considering that the embezzled funds end up in offshore accounts and tax havens.<sup>18</sup> The Office of the Director of Public Prosecutions has experienced significant delays in processing applications for mutual legal assistance with foreign entities.

#### **Devolution and SMEs**

The implementation of devolution in Kenya has created a myriad of problems between the National Government and the county government. The constitution provides that not more than 15% of the national revenue shall be devolved. The majority of the counties rely on funds from the national government to finance their development agenda. The Constitution, however, provides that each county should come up with a legislation on how best to generate revenue in their counties. Although counties are uniquely different, small and medium businesses have suffered the brunt of inadequate sources of revenue in the counties.<sup>19</sup> They are forced to pay taxes both to the county government and national government. The excessive taxation of small business owners is affecting the growth of SMEs which form an integral part of the Third Medium Term Plan. New tax laws passed by counties across Kenya have increased the tax rates for SMES by 400% since 2010. The Third Medium Term Plan has placed a lot of emphasis on the productivity of labor in the country.<sup>20</sup> The National government previously faced a problem of ghost workers and that problem has also

been transferred to the county governments. The majority of the county government workers are on contract and since they do not have job security they usually search for alternative means of generating income. Since the county government is not keen on oversight the county governments end up facing the challenge of ghost workers. There is a need to develop rules and regulations governing contract workers both in county government and national government to ensure that their remuneration is based on performance targets.

#### **Climate Change**

Climate change poses the greatest threat to the sustainable development and economic progress in Kenya. Climate change affects human activities, food security, industrial developments and health. It is essential to understand that climate change has the potential to reverse all the gains made under Vision 2030 and Millennium Development Goals.<sup>21</sup> The Kenyan economy is vulnerable to climate change since most of the drivers of economy are agriculture, tourism, livestock, forestry and fisheries which are climate change sensitive.<sup>22</sup> Kenya has been cognizant of the threat posed by Climate Change and has adopted several international treaties and subsequently enacted domestic laws to be in conformity with those treaties. Kenyans are already feeling the brunt of climate change as a result of dried up rivers and depleting forest covers in the country.<sup>23</sup> Erratic weather patterns have also been experienced in the recent past culminating in drought and or excessive rainfall causing floods and destruction of property. The implementation of the existing laws and regulations is a challenge to law enforcement authorities.<sup>24</sup> A weak regulatory framework has allowed companies and unscrupulous businesses to exploit environmental resources in Kenya. Ngong Forest which is a water catchment area in Nairobi is facing serious threats from tree loggers. Aerial pictures of the forest as of March 2018 show that law enforcement authorities have been complacent in enforcing the environmental regulations.

#### **Conclusion**

The Implementation of the Second Medium Term plan can be considered a success despite the numerous challenges that were encountered in the process. The MTP 2 saw the implementation of devolution and a steady growth of the economy.

<sup>17</sup>Rose, R., &Peiffer, C.(2015). *Paying bribes for public services:A global guide to grass-roots corruption*. Houndmills, Basingstoke: Palgrave Macmillan.

<sup>18</sup>Sichei, M. M.(2010).Impact of corruption on the national economy. In J. Kivuva & M.Odhiambo (Eds.), *Integrity in Kenya's public service: Illustrations from the Goldenberg and Anglo-Leasing scandals* (pp. 123–151). Nairobi: CLARION (Center for Law and Research International).

<sup>19</sup>Odhiambo, S. (2013).Kenya's Momentous Devolution: proper policies are needed to devolve SMEs. *Business Daily*, Monday.

<sup>20</sup>Abdulasiz, A. M., & Andrew. C.W., (2013). Small and Medium Sized Enterprises Financing. *International Journal of Business and Management*. (8) 9-10.

<sup>21</sup>ROK (2007). National Policy on Disaster Management. Prepared by the Ministry of Special Programmes, Nairobi, Kenya.

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Insecurity in the country contributed to slow growth especially in the tourism sector. The manufacturing sector in Kenya has also suffered because of cheap imports and reduced share of Kenyan goods in the export sector. The Banking (Amendment) Act of 2016 saw a reduction of lending rates by placing a cap of 4% above the rates of the CBK. The slow uptake of PPPs and financial volatility of the financial sector were some of the reasons of the failure to achieve an economic growth rate of 10%. This paper addresses some the legal challenges that would act as an impediment in the implementation of the Third Medium Term Plan. The majority of the legal challenges entail weak regulatory framework especially in the bid to achieve the blue economy goals, agriculture and public private partnerships. Corruption is one of the leading causes of slow economic growth in Kenya primarily because the funds meant for development are diverted. It is expected that a vibrant legal, policy and regulatory framework will spearhead the efficient implementation of the vision 2030 through MTP 3.

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